

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016

~~BEFORE THE ENVIRONMENTAL APPEALS BOARD~~
~~UNITED STATES~~
~~UNITED STATES ENVIRONMENTAL PROTECTION AGENCY~~
~~WASHINGTON, D.C.~~

| | | |
|---|---|---|
| IN THE MATTER OF: |) | EPA Docket No. |
| |) | RCRA-HQ-2016-_____ |
| |) | |
| |) | |
| Whole Foods Market Group, Inc., |) | Proceeding Under Section 3008(a) of the |
| Whole Foods Market California, Inc., |) | Resource Conservation and Recovery Act, |
| Mrs. Gooch's Natural Food Markets, Inc., |) | 42 U.S.C. § 6928(a) |
| Whole Foods Market Pacific Northwest, Inc., |) | |
| and Whole Foods Market Rocky Mountain/ |) | |
| Southwest, L.P., |) | |
| |) | |
| RESPONDENTS. |) | |

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, and Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement and Final Order ("CAFO") before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole

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Foods Market stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of these proceedings, Respondents admit the jurisdictional allegations herein; however, Respondents neither admit nor deny the factual and legal allegations contained in this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the specific factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to fully implement the compliance provisions set forth in this CAFO; and
- e. Respondents consent to fully implement the Supplemental Environmental Projects set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations in this CAFO, any right to appeal the proposed Final Order set forth herein, and waive all defenses which have been raised or could have been raised to the claims set forth in the CAFO. 40 C.F.R. § 22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of the CAFO or its terms.

II. THE PARTIES

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5. Gregory Sullivan, Acting Director, Waste and Chemical Enforcement Division,

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Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

3-6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

4-8. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), provides that EPA may authorize a state to administer its hazardous waste program in lieu of the federal program, when the Administrator deems the state to be equivalent to the federal program.¹

9. Pursuant to RCRA Sections 3006(b), 42 U.S.C. § 6926(b), and Section 3008(a) and (g), 42 U.S.C. §§ 6926, 6928(a) and (g), a violation of any requirement of law under an authorized state hazardous waste program is a violation of a requirement of Subtitle C, and EPA may enforce federally-authorized-approved-state hazardous waste programs by issuing orders requiring

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273.

compliance immediately or within a specified time for such violations, as well as the federal regulations promulgated pursuant to HSWA.²

5-10. The violations of RCRA described herein are alleged to have occurred in all Affected States and Territories and this compliance agreement covers Whole Foods Market's Stores in all Affected States and Territories, so citations to federal RCRA regulations are used for the parties' convenience. Respondents agree that the terms of this compliance agreement govern their actions but that States may impose requirements broader in scope than the federal regulations and this CAFO.

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6-11. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

7. Respondents waive any right to appeal the proposed Final Order set forth herein. Respondents do not waive any claims or defenses Respondents have to the interpretation of the CAFO or its terms.

IVII. DEFINITIONS

8-12. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO.

² Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer their own hazardous waste program.

Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.

- b. “Business Day” means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. “Conditionally Exempt Small Quantity Generator” means a facility that generates 100 kg of hazardous waste or less in a calendar month.
- d. “Confidential Business Information” or “CBP” shall have the same definition as in 40 C.F.R. §§ 2.201-2.406.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section XVIII of this CAFO.
- i. “EPA” means the United States Environmental Protection Agency.
- j. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.

- k. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.
- l. “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- m. “Parties” shall mean Complainant and all Respondents.
- n. “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- o. “Respondents” mean the entities described in Paragraphs 1 and 6 of this CAFO, or one or more such Respondent(s) as applicable.
- p. “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.
- q. “Section” shall mean a portion of this CAFO identified by a roman numeral.
- r. “Small Quantity Generator” means a facility who generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- s. “Small Quantity Handler of Universal Waste” means a universal waste handler who does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or lamps, calculated collectively) at any time.
- t. “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.

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s.d. “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including “365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories). This term does not include distribution centers owned and operated by Whole Foods Market.

v. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

w. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps.

t.x. “Universal Waste Handler” includes a generator of universal waste.

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V. STATUTORY AND REGULATORY BACKGROUND

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13. RCRA Subtitle C, 42 U.S.C. §§ 6921 *et seq.*, empowers EPA to identify and list hazardous wastes. It also authorizes EPA to regulate hazardous waste generators, transporters, and the owners and operators of hazardous waste treatment, storage, and disposal facilities. EPA has promulgated regulations to implement RCRA Subtitle C, which are set forth at 40 C.F.R. Parts 260-279.

14. Pursuant to Section 3001 of RCRA, 42 U.S.C. § 6921, EPA promulgated regulations to define what materials are “solid wastes,” and of these solid wastes, what wastes are regulated as “hazardous wastes.” These regulations and definitions are set forth at 40 C.F.R. Part 261.

15. Pursuant to 40 C.F.R. § 261.2, a “solid waste” is any discarded material that is not otherwise excluded by regulation or variance.

16. Pursuant to 40 C.F.R. Part 261, there are two (2) categories of hazardous wastes—“listed” and “characteristic.” Those wastes that have been determined to be hazardous by definition have been assigned certain identification numbers and are referred to as “listed wastes.” “Characteristic hazardous wastes” are solid wastes that exhibit one or more of the following characteristics: ignitability, reactivity, corrosivity or toxicity.

9-17. Section 3002 of RCRA, 42 U.S.C. § 6922, requires EPA to establish standards applicable to generators of hazardous wastes. These standards are codified at 40 C.F.R. Part 262 and include requirements for determining whether a waste is hazardous, managing waste in proper containers, labeling and dating containers, inspecting waste storage areas, training, planning for emergencies, and procedures and requirements related to shipping wastes off-site for treatment, storage, or disposal.

IV. EPA FACTUAL AND LEGAL ALLEGATIONS AND DETERMINATIONS

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10-18. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

14-19. Respondents own and operate the Stores identified in Appendix A of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

12-20. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

12-21. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

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~~14.22.~~ Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

~~23.~~ Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.’s Stores located in Texas, Oklahoma, New Mexico and Arkansas and found that these stores contained customer returns and expired products that are hazardous waste due to the characteristics identified in paragraph 21 of this CAFO.

~~24.~~ The investigation described in Paragraph 23 of this CAFO revealed that Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. failed to make sufficient hazardous waste determination of its solid waste streams as required by 40 C.F.R. § 262.11(c).

~~25.~~ The investigation described in Paragraph 23 of this CAFO also revealed that Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. is a small quantity handler of universal waste that failed to comply with one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16.

~~15.26.~~ As a result of the investigation, EPA Region 6 and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6’s jurisdiction (the “Region 6 CAFOs”).³

³ As set forth in Paragraph 26 of this CAFO, Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. owns and operates Whole Foods Market Stores in Texas, Oklahoma, Arkansas, and New Mexico. Whole Food Company, Inc.—not a party to this case—owns and operates Whole Foods Market Stores in Louisiana. See USEPA Docket Nos. RCRA-06-2016-0904 through 0908 for the Region 6 CAFOs.

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~~16.27. Although EPA has not conducted its own investigation of Stores located outside Texas, Oklahoma, New Mexico and Arkansas. In September 2016, the Respondents approached and EPA have mutually agreed to voluntarily disclose into a similar violations of RCRA at Whole Foods Market Stores agreement for stores located in all states and territories other than those covered by the Region 6 CAFOs. Respondents also disclosed that there were no spills, leaks or releases from their Stores resulting from these voluntarily-disclosed violations. EPA and Respondents have engaged in expedited discussions to reach the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs ____ of this CAFO and appendices ____.~~

~~17.28. Respondents have already taken steps to implement their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.~~

Hazardous Waste Determinations

~~18.29. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.~~

~~30. Based upon the terms of the Region 6's investigation and discussions between the Parties, as described in Paragraph 27 of this CAFO, and without independent investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not systematically make hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.~~

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49. Universal Waste Management

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31. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with 40 C.F.R. § 273.10 through 273.20. EPA did not identify any spills, leaks or releases at or from Respondents' facilities.

20-32. Based upon Region 6's investigation and discussions between the Parties, as described in Paragraph 27 of this CAFO, EPA has concluded that Respondents did not systematically comply with some of the standards set forth in 40 C.F.R. § 273.13 through 273.16 at all Whole Foods Market Stores.

VII. TERMS OF SETTLEMENT

21-33. Based on the foregoing, the Parties agree to the entry of this CAFO on the terms set forth herein.

A. Compliance Provisions

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22-34. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs ____ through ____ and Appendices ____ through ____ of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators ("SQGs") and, therefore, goes above and beyond the minimum requirements applicable under the law.

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23-35. As a condition of settlement, Respondents consent to and agree to implement the following measures in accordance with the timeframes (if applicable) set forth below as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.

- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. Within _____ days of the Effective Date of this CAFO, Respondents will hire a third-party consultant to review the Consumer Products at its Stores, including any individual store-acquired products, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations ("RCRA Items"). The third-party consultant, after identifying the potentially hazardous items, will load the information (i.e., RCRA Items) into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams. Respondents' electronic hazardous waste identification system is a handheld terminal (or equivalent). This system is described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- d. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site per requirements applicable to SOGs at 40 C.F.R. §

262.34, including, but not limited to, accumulation time limits, inspections, management of containers, and the special requirements for incompatible wastes. This system (commonly referred to as the “bucket” or “tote” system) accumulates and stores hazardous waste per RCRA provisions until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Respondents shall maintain records and other documentation to demonstrate proper off-site transport and disposal at their Stores pursuant to 40 C.F.R. § 262.40. The “bucket” or “tote” system and its associated quick-reference materials for Retail Associates are further described and set forth in Appendix D of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- e. Respondents have implemented, and will continue to implement mandatory hazardous waste management training at its Stores for all Retail Associates. Ex. 4 CBI

Ex. 4 CBI

Ex. 4 CBI

Ex. 4 CBI

are further described in Attachment E of this CAFO. The trainings and support services are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2. In order to assist its Stores in implementing this enhanced hazardous waste management program, Respondents will develop and implement standard operating procedures (“SOPs”) for use by Retail Associates.

~~E. Third Party Audit [To Be Discussed]~~

36. In order to assist its Stores in implementing the enhanced hazardous waste management program described in Paragraph 35 of this CAFO, Respondents will develop and implement standard operating procedures (“SOPs”) for use by Retail Associates at their Stores. These SOPs must be available and accessible to Retail Associates. These procedures are further described in Attachment F of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

37. No later than January 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: all RCRA Items identified by the third-party consultant described in Paragraph 35(c), implementation progress of its electronic hazardous waste identification system described in Paragraph 35(c), and any other changes or updates associated with its enhanced hazardous waste management program, as described in Paragraphs 35 and 36 of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~38. Third Party Audit [To Be Discussed]~~

~~24-39. Respondents must shall certify compliance to EPA with the appropriate documentation to certify that they are complying with the requirements set forth in Paragraphs~~
~~_____ above, within _____ days of the schedule provided for completion in Appendix_____. The~~
certification and supporting documentation should be provided to:

Greg Sullivan, Acting Division Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (2249A)
Washington, DC 20460

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~~25.1. Nothing in this CAFO will require Respondents to meet more stringent requirements contained in this CAFO in the event that the applicable law becomes less stringent. Within sixty (60) days of Whole Foods Market providing written notice to EPA that applicable requirements have been modified by issuance of any new EPA final regulation (as promulgated in the Federal Register), policy or guidance governing hazardous waste management; upon EPA approval or promulgation of new or revised waste management standards; or upon the issuance of a permit that contains new requirements pertaining to Whole Foods Market's operations, Whole Foods Market may conform its practices to the less stringent obligations contained in the applicable new regulation, policy, new or revised standard or permit.~~

B. Civil Penalty

~~40.~~ Respondents agree to pay a civil penalty in the sum of \$_____ within thirty (30) days of the ~~E~~ffective ~~D~~ate of this CAFO.

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~~26-41.~~ Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza

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St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental
Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al.,
Docket No. RCRA-HQ-2016-____) must be clearly documented on or within Respondents'
chosen method of payment to ensure proper credit.

~~27.42~~ Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

~~28.43~~ Penalties paid pursuant to this CAFO are not deductible for federal purposes under
26 U.S.C. § 162(f).

~~29.44~~ Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).
- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

45 [Terms TBD]

D. Delay in Performance/Stipulated Penalties

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46. Respondents shall be liable for stipulated penalties to the EPA, as specified below, for failure to comply with the requirements of this CAFO, unless excused by EPA in its sole discretion. Compliance by Respondents shall include the timely completion and submittal of any reports or other submissions required by this agreement or any subsequent modification. Respondents must pay stipulated penalties in the following amounts for the following obligations in the amounts set forth below:

- a. for failure to timely submit reports, or
- b. for failure to comply with Paragraphs _____ of this CAFO.

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| <u>Period of Failure to Comply</u> | <u>Penalty Per Violation Per Day</u> |
|------------------------------------|--------------------------------------|
| 1st through 7th day | \$100.00 |
| 8th through 21st day | \$250.00 |
| 22nd through 30th day | \$500.00 |
| Greater than 30 days | \$1,000 |

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47. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

48. Nothing in this CAFO will require Respondents to meet more stringent requirements contained in this CAFO in the event that the applicable law becomes less stringent. Within sixty (60) days of Whole Foods Market providing written notice to EPA that applicable requirements have been modified by issuance of any new EPA final regulation (as promulgated in the Federal Register); policy or guidance governing hazardous waste management; upon EPA approval or promulgation of new or revised waste management standards; or upon the issuance of a permit that contains new requirements pertaining to Whole Foods Market's operations, Whole

Foods Market may conform its practices to the less stringent obligations contained in the applicable new regulation, policy, new or revised standard or permit.

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VIII. OTHER MATTERS

A. Effect of Settlement/Reservation of Rights

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31.49. In accordance with the Consolidated Rules, 40 C.F.R. § 22.18(c), completion of the terms of this CAFO resolves only Respondents' liability for federal civil penalties for the violations alleged in Section VI (EPA Allegations and Determinations) of this CAFO. The terms of this CAFO constitute a full and final settlement between the Parties for all claims that have been brought or could have been brought against Respondents related to the subject matter of this CAFO, and shall bar any further actions against Respondents for acts related to the subject matter of this CAFO which allegedly occurred prior to the date of entry of this CAFO.

32.50. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

51. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment.

52. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

33.53. Except as expressly provided herein, nothing in this CAFO shall constitute or be construed as a release from any civil or criminal claim, cause of action or demand in law or equity.

for any liability Respondents may have arising out of, or relating in any way to, the storage, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Respondents' Stores

34-54. Unless specifically allowed under the terms of this CAFO, this CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

B. Parties Bound Costs

55. The provisions of this CAFO shall apply to and be binding upon the Parties to this action, their officers, directors, agents, employees, successors, and assigns. The undersigned representative of each party to this CAFO certifies that he or she is fully authorized by the party whom he or she represents to enter into the terms and conditions of this CAFO and to execute and to legally bind that party to it.

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C. Dispute Resolution

56. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this CAFO.

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57. If Respondents disagree, in whole or in part, with any decision by EPA under this CAFO, Respondents shall notify EPA through the Chief of the Waste Enforcement Branch, and the Parties must use their best efforts to informally and in good faith resolve all disputes or differences of opinion relating to this CAFO.

58. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding paragraph, Respondents may pursue the matter by submitting its objection to the Chief of the Waste Enforcement Branch of EPA in writing. Respondents' written objections must

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set forth the specific points of the dispute, the basis for Respondents' position and any matters which it considers necessary for EPA's determination.

59. Complainant and Respondents shall have thirty (30) days from receipt of Respondents' written objections to attempt to resolve the dispute through formal discussions.

60. Within sixty (60) days of EPA's receipt of Respondents' written objections, EPA, through the Chief of the Waste Enforcement Branch of EPA, will provide to Respondents in writing EPA's decision on the pending dispute.

61. If Respondents disagree with the written decision, the Respondents may, within thirty (30) days of receipt of the written decision, appeal to the Director, Waste and Chemical Enforcement Division. Respondents' appeal must set forth the specific points of the dispute, the basis for Respondents' position and any matters which it considers necessary for EPA's determination. Within thirty (30) days of receipt of the appeal, the Director, Waste and Chemical Enforcement Division will issue a written decision.

62. If Respondents disagree with the written decision of the Director, Waste and Chemical Enforcement Division, within sixty (60) days of receipt of the Director's decision, Respondents may file an appeal of that decision with the Environmental Appeals Board ("EAB").

63. The Parties may, by mutual written agreement, extend any of the time periods provided for in the dispute resolution process.

D. Force Majeure

64. A "Force Majeure event" is any event beyond the control of Whole Foods Market, its contractors, or any entity controlled by Whole Foods Market that delays the performance of any obligation under this CAFO despite Whole Foods Market's reasonable efforts to fulfill the obligation. "Reasonable efforts" includes anticipating any potential Force Majeure event and

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addressing the effects of any such event: (1) as it is occurring, and (2) after it has occurred, such that the delay is minimized to the greatest extent reasonably possible.

65. Whole Foods Market agrees to notify the United States by written notice as soon as possible, but not later than 72 hours after the time Whole Foods Market first knew of any event which might constitute a Force Majeure event. The written notice Whole Foods Market submits pursuant to this Paragraph will indicate whether Whole Foods Market claims that the delay should be excused due to a Force Majeure event. The notice will describe the basis for Whole Foods Market's contention that it experienced a Force Majeure delay, the anticipated length of the delay, the cause or causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. Whole Foods Market agrees to adopt all reasonable measures to avoid or minimize such delay.

66. If the United States finds that a delay in performance is, or was, caused by a Force Majeure event, the United States agrees to extend the time for performance, in writing, for a period to compensate for the delay resulting from such event, and stipulated penalties will not be due for such a period. In proceedings on any dispute regarding a delay in performance, Whole Foods Market will have the burden of proving, by a preponderance of the evidence, that the delay is, or was, caused by a Force Majeure event and that the amount of additional time requested is necessary to compensate for that event.

67. An extension of one compliance date based on a particular event will not automatically extend any other compliance date. Whole Foods Market will make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought.

~~35.1. Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.~~

36. ~~{terms of agreement not to sue/take action TBD}~~

E. Notification

37-68 Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

F. Termination and Satisfaction

38-69 At such time as the Respondents believe it has completed all of the requirements of this CAFO, they may request that EPA concur whether all of the requirements of this CAFO have been satisfied. Such request must be Respondents shall so certify in writing and shall provide the necessary documentation to establish whether there has been full compliance with the terms and conditions of this CAFO. EPA will respond to said request in writing within ninety (90) days of receipt of the request. This CAFO shall terminate when all actions required to be taken by this

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~~CAFO have been completed, and the Respondents have been notified by the EPA in writing that this CAFO has been satisfied and terminated, in accordance with the certification language set forth in Paragraph _____. Unless EPA objects in writing within sixty (60) days of receipt of Respondents' certification, then this CAFO shall terminate on the basis of Respondents' certification.~~

G. Miscellaneous Effective Date

70. Unless specifically allowed under the terms of this CAFO, this CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

71. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

72. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

39-73. The Effective Date of this CAFO is the date effective upon the filing of the Final Order is filed with the Environmental Appeals Board. 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

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AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Greg Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

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FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

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